

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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:
UNITED STATES OF AMERICA, :
:
v. : 04-CR-821 (NG)
:
JOSHUA KESTENBAUM, : January 26, 2012
:
Defendant. : Brooklyn, New York
:
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TRANSCRIPT OF CRIMINAL CAUSE FOR CONFERENCE
BEFORE THE HONORABLE ROBERT M. LEVY
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Government: LORETTA LYNCH, ESQ.
UNITED STATES ATTORNEY
BY: BONNI PERLIN, ESQ.
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1 THE CLERK: Criminal cause for conference, United
2 States v. Joshua Kestenbaum, docket number 04-CR-821.

3 Please state your appearances for the record.

4 MS. PERLIN: Bonni Perlin for the United States.

5 MR. LEWIS: Alan Lewis, Carter, Ledyard & Milburn,
6 for Mr. Kestenbaum.

7 MR. MCGOVERN: James McGovern for the United
8 States as well. Good afternoon, your Honor.

9 THE COURT: Good afternoon.

10 All right, so this is my first official
11 involvement in the case. I understand the government and
12 the defense have a slightly different view about this case.

13 MS. PERLIN: Yes, your Honor.

14 MR. LEWIS: Fair to say.

15 THE COURT: So I think it would just be useful if
16 you could just outline your different views about the case
17 and what you think the Court should do, in other words hold
18 a hearing, do something else, basically how you think the
19 dispute could best be resolved.

20 MR. LEWIS: Who would you like to address that at
21 this time?

22 THE COURT: Maybe I'll start with the government.

23 MS. PERLIN: Your Honor, the government seeks to
24 have the Court modify Mr. Kestenbaum's payment plan based on
25 its discovery and investigation of Mr. Kestenbaum's finances

1 and Bake Me a Wish's finances.

2 We believe that Mr. Kestenbaum has the ability to
3 make payments towards his restitution of at least \$10,000 a
4 month. It's my understanding that Mr. Kestenbaum at the
5 present time has not been paying any restitution, that he
6 has not paid restitution for approximately six months. He
7 can correct me if I'm wrong.

8 THE COURT: The total restitution amount is eleven
9 million, is that right? Do I have that right?

10 MS. PERLIN: It is \$11,159,447.

11 THE COURT: Okay.

12 MS. PERLIN: At the time of sentencing, Judge
13 Gershon had ordered Mr. Kestenbaum to pay \$2,500 a month,
14 with the understanding that his finances would be
15 investigated and his payment plan would be modified, if
16 appropriate.

17 Currently, Mr. Kestenbaum's mother has been paying
18 his \$6,000 a month rent. His wife earns approximately
19 \$6,000 per month from her job and from distributions from a
20 family trust. Mr. Kestenbaum's children are now college age
21 and older, so Mr. Kestenbaum does not require significant
22 for any necessary living expenses.

23 Kestenbaum argues that the government hasn't
24 demonstrated that he has used Bake Me a Wish's funds to pay
25 for lavish personal expenses. I believe that the

1 government's -- the motion and the thousands of pages of
2 exhibits, the bank statements and the accounting records
3 demonstrate that, although I might not be able to identify a
4 significant tangible asset that he spent the money on, he
5 has in fact spent close to a million dollars of the
6 company's funds on personal expenses for himself and his
7 family.

8 THE COURT: During what period?

9 MS. PERLIN: From the time that the company was
10 started, which was before he was sentenced, I believe in
11 2004, up through 2010, I believe is when -- was the end of
12 the accounting records that I have from the company.

13 THE COURT: What was the date of sentencing?

14 MS. PERLIN: It was 2008. The judgment date is
15 June 12th, 2008. Mr. Kestenbaum has argued that Bake Me a
16 Wish is not profitable and has been operating on a shoe-
17 string budget and any minute, it could disappear. But it
18 has been operating for approximately eight years, all while
19 paying for his personal expenses, and is currently
20 profitable, is my understanding based on his supervising
21 probation officer's conversations with Joseph Dornoff (ph),
22 who is another employee, who is now I think an owner of Bake
23 Me a Wish.

24 Nevertheless, even when Bake Me a Wish was
25 reportedly just breaking even, it was breaking even while

1 paying for Mr. Kestenbaum's personal expenses, and the
2 government believes that that money would be better spent on
3 Mr. Kestenbaum's restitution judgment instead of himself.
4 We are not asking Bake Me a Wish to pay Mr. Kestenbaum
5 really any more than it has been over this eight-year
6 period. We're just asking that the funds be used to pay
7 restitution.

8 The one question that we still have, and I would
9 like to take additional discovery on now is about Mr.
10 Kestenbaum's mother's finances. She appears to have --
11 well, she has given Mr. Kestenbaum personally and the
12 business significant funds since the business was started.
13 I think it was approximately a year and a half ago, she took
14 out a home equity loan to repay a loan that was allegedly
15 taken out by Mr. Kestenbaum's wife from the business.

16 Mr. Kestenbaum represented at his deposition that
17 she didn't have much in the way of finances. The home,
18 actually a year ago today, I just discovered, was
19 transferred to a trust, a Kornago (ph) 2010 trust, I
20 believe. So I would like to take quickly just some
21 discovery into whether or not his mother actually has any
22 documentation for the alleged loans to the company, how
23 she's been able to support Mr. Kestenbaum and lend money to
24 the company over the years, and I'd like to know more about
25 this recent transfer of the house to a trust.

1 As far as where this proceeding is going, I don't
2 know if the Court is comfortable in making a determination
3 based on the papers.

4 THE COURT: That is the question. I have a boxful
5 of papers.

6 MS. PERLIN: I think it's possible. I did take
7 four or five depositions. The bank statements really speak
8 for themselves, the accounting records combined with the
9 testimony.

10 THE COURT: Is the government requesting a hearing
11 or waiting to see whether it's necessary at this point?

12 MS. PERLIN: I think we're just waiting --

13 THE COURT: Not sure?

14 MS. PERLIN: -- yeah, to see if the Court believes
15 it's necessary.

16 THE COURT: It may be. I'm just not at the point
17 yet where I know.

18 MS. PERLIN: Right.

19 THE COURT: I'm sure I'll hear from defendant on
20 whether a hearing is necessary as well.

21 What's the date of the most recent probation
22 report on Mr. Kestenbaum's finances?

23 MS. PERLIN: A financial statement submitted by
24 Mr. Kestenbaum?

25 THE COURT: Yes.

1 MS. PERLIN: I actually haven't seen any of those.

2 THE COURT: Okay.

3 MS. PERLIN: Mr. Kestenbaum was being supervised
4 by the Southern District of New York up until recently.

5 THE COURT: Right.

6 MS. PERLIN: And I believe that his current
7 Eastern District of New York probation officer has requested
8 financial statements. I don't know if she's received them.
9 I haven't seen any of them. I've only seen the financial
10 statement he submitted to the financial litigation unit,
11 which was back in, I believe, the summer of 2008.

12 THE COURT: So Probation in the Eastern District
13 has not updated that report, as far as you can tell.

14 MS. PERLIN: I do think that Mr. Kestenbaum
15 recently submitted tax returns and bank statements. I don't
16 recall if he submitted a new financial. He can probably
17 tell you that.

18 THE COURT: I'm sure he can.

19 THE DEFENDANT: I did.

20 THE COURT: You did. Do you remember when?

21 THE DEFENDANT: Three weeks ago.

22 THE COURT: Three weeks ago, okay. So nothing has
23 come out of Probation yet then, is that right, no analysis,
24 no report, no update?

25 THE DEFENDANT: Not that I'm aware of.

1 MR. LEWIS: Not that we are aware of, your Honor.

2 MS. PERLIN: The Probation Department recently, I
3 think it was in a combined objection to Mr. Kestenbaum's
4 request for travel, noted that they were considering
5 submitting a request for a violation of probation, based on
6 his failure to pay restitution and failure to make full
7 financial disclosure. I believe they had asked Judge
8 Gershon for an extension to submit a memo through some time
9 in February.

10 MR. LEWIS: They asked for an extension until
11 February 28th, I believe. I'm sorry, my understanding is
12 that the Probation Department asked for an extension. Is it
13 not coming through. The green light is on. Ah, the light
14 is now on.

15 THE COURT: Just pull it a little closer to you,
16 then you'll be comfortable.

17 MR. LEWIS: My understanding is that the Probation
18 Department has asked for additional time, until February
19 28th, to decide whether to initiate a violation proceeding.

20 THE COURT: So the Probation Department is going
21 to complete its own investigation and then make its
22 recommendation.

23 MR. LEWIS: Apparently, yes.

24 THE COURT: Okay.

25 MS. PERLIN: I do think, your Honor, that if this

1 proceeding ultimately goes to a hearing, I'm actually
2 confused as to how that's going to work with the violation
3 proceeding, considering that his failure to pay restitution
4 is really the subject of both.

5 THE COURT: Right. Well, it may make sense to
6 consolidate them into one proceeding.

7 MS. PERLIN: Yeah.

8 THE COURT: Again, that's something that I think
9 procedurally, I could use your input on what you think is
10 the most efficient way to handle this from both sides. It's
11 just something to think about. You may not know the answer
12 to that today.

13 (Pause in Proceedings)

14 MS. PERLIN: I think that -- I guess the two
15 proceedings are -- depending on whether or not your Honor
16 believes you can make a determination based on the papers
17 and depending on what Judge Gershon decides to do given that
18 Mr. Kestenbaum is not paying restitution at all right now,
19 that it may make sense at some point to consolidate the two.

20 THE COURT: What does the defendant think?

21 MR. LEWIS: We agree that if there are to be
22 hearings on both matters, that it would make a great deal of
23 sense to consolidate them rather than -- particularly, two
24 different hearings in two different courtrooms doesn't make
25 a lot of sense.

1 THE COURT: Right. I don't think there would be
2 -- I think I would be doing both is my guess, because I
3 think that's why Judge Gershon referred it.

4 MR. LEWIS: I would agree that you should -- if
5 indeed the Probation Department decides to pursue a
6 violation proceeding -- I don't know that they will but if
7 they do, we would agree that you should consolidate that
8 proceeding with any hearing you decide to conduct here.

9 THE COURT: So it could be that the hearing could
10 be applicable to both proceedings, and the violation
11 proceeding could either proceed before me or before Judge
12 Gershon. But as a matter of efficiency, it would seem to
13 make sense to have only one hearing.

14 MR. LEWIS: I agree.

15 MS. PERLIN: I agree.

16 THE COURT: Okay. Is there anything else the
17 government wishes to say at this point?

18 MS. PERLIN: No.

19 THE COURT: Does Mr. Kestenbaum want to add
20 anything at this point?

21 MR. LEWIS: I will for him, your Honor.

22 THE COURT: Okay.

23 MR. LEWIS: I didn't come here today to make an
24 argument. I didn't understand this to be the purpose of
25 today's appearance.

1 THE COURT: No, it's not.

2 MR. LEWIS: But I'll only very briefly summarize
3 our position here.

4 The government doesn't claim -- and it's conducted
5 quite an extensive investigation. It doesn't claim that Mr.
6 Kestenbaum is hiding any money or accounts, money overseas,
7 money in banks, money held for him under the names of
8 others. It's looked pretty hard, I think. And what all of
9 this is about is its claim that he can use Bake Me a Wish to
10 pay much more in restitution than the \$2,500 a month that
11 Judge Gershon ordered in 2008. For reasons that I've argued
12 in the papers, I don't think that that is true.

13 First of all, I don't think it's correct that Bake
14 Me a Wish's assets are Mr. Kestenbaum's to use as he
15 pleases. It has an outside investor who paid for his
16 investment in the entity. Family members of his also own
17 equity, and that equity interest was purchased with money
18 that was expressly reserved for them. And I don't believe
19 that Bake Me a Wish's assets belong to Mr. Kestenbaum, and I
20 don't believe that he can decide on his own to use them.

21 What he can do is he can use his income. Right
22 now, he hasn't had one. I understand that Bake Me a Wish's
23 finances, its financial stability is tenuous; it rises and
24 it falls. It's not constant and at times, they can afford
25 to pay him, and at times, they can't. I understand that --

1 and I believe very recently, they started to pay him a
2 modest salary again, and he intends to do the best to pay as
3 much restitution as he possibly can.

4 However, his salary has always been modest. The
5 total amount of money that he's gotten from Bake Me a Wish
6 has been relatively modest over the years, and I just -- an
7 order that would require him to pay much more in restitution
8 than he's paid in the past could only be satisfied by Mr.
9 Kestenbaum if he were to ask the company -- and he has
10 influence over its decisions as its president, as its chief
11 executive. He doesn't control it entirely by himself; there
12 are other people that have to be consulted.

13 But even if it were true that he could, by
14 himself, cause the company to pay him lots of money, the
15 Court shouldn't do that. Its finances are quite tenuous.
16 At best, it's been operating at break even for some time. I
17 think it lost about \$80,000 last year. And its balance
18 sheet shows that the company is ailing. It is technically
19 insolvent and I was surprised that the government sought to
20 have the Court order Mr. Kestenbaum to pay lots of money out
21 of the assets of an entity, without even analyzing its
22 balance sheet.

23 THE COURT: Can you tell me about the entity, just
24 a brief, thumbnail description of it?

25 MR. LEWIS: The business idea is that

1 historically, businesses have kept in touch with their
2 clients and earned their client's good will by sending them
3 things like birthday cards. It's important to people
4 generally to have their birthday be remembered, and the
5 concept of Bake Me a Wish is to take it up from simple
6 birthday cards to cakes.

7 Mr. Kestenbaum's -- I may not be perfect at
8 describing exactly where it sits in its process, but its
9 clients essentially are its customers who want to remember
10 its own clients' birthdays by sending them cakes. Mr.
11 Kestenbaum's company basically is the middle person, the
12 middle man in that process between whatever the business is
13 and the birthday cake recipient. So they arrange for the
14 baking of the cakes, they contract for them. That's what
15 they do.

16 So in terms of how the Court should go about
17 deciding the issues that have been raised here and whether a
18 hearing is necessary, I don't come here believing that a
19 hearing is necessary, but I think that ultimately, the
20 answer to that question depends on the Court's analysis of
21 the issues that have been raised by both sides in the
22 papers. And perhaps it makes sense to have another
23 conference, at which the Court might identify -- if there
24 are factual issues that the Court feels that it can't decide
25 based on the papers, maybe it would make sense to discuss

1 them or even -- well, that would be the approach I would
2 recommend.

3 THE COURT: Where does Probation fit in, in this
4 scenario? Do we need them at the next conference? Do we
5 need to wait for them to do an analysis? Do we wait to see
6 whether Probation brings a violation?

7 MR. LEWIS: Since it is obviously possible that
8 they will bring a violation proceeding, and if they do, any
9 factual issues will be combined -- that your Honor
10 identifies will be combined into the same hearing, I agree
11 it doesn't make any sense certainly to start conducting a
12 hearing before they weigh in. I think that between -- I
13 would certainly wait for their decision before a hearing is
14 conducted, if a hearing is ever necessary.

15 THE COURT: Do we need them for the next
16 conference?

17 MR. LEWIS: I think that depends on what the next
18 conference is for.

19 THE COURT: Well, if it's what you suggest. Both
20 parties and the Court will have reviewed the papers
21 carefully and be prepared to discuss the issues at that
22 point, to determine whether there are factual issues, legal
23 issues alone, whether a hearing is necessary. Is Probation
24 -- is its attendance optional, useful, not at all useful at
25 such a conference?

1 MR. LEWIS: It is -- I think that unless and until
2 they bring a violation proceeding, their appearance here is
3 certainly not required, and I don't even know that it's
4 helpful or necessary. If they do bring a violation
5 proceeding, then they should be here, so that we can
6 consolidate things.

7 MS. PERLIN: I think it would be useful, at the
8 very least, to have a probation officer here, given that
9 Probation has much more up-to-date information about Mr.
10 Kestenbaum's finances and what he's reporting currently. We
11 are not currently requiring Mr. Kestenbaum, although I don't
12 know about in the future, to report as frequently as he does
13 to Probation.

14 THE COURT: All right. Is there anything that we
15 haven't touched on that we should discuss?

16 MR. LEWIS: I'm just looking over my notes. I
17 don't agree with some of the things that Ms. Perlin said
18 that I haven't yet addressed.

19 THE COURT: Okay.

20 MR. LEWIS: But I don't know that I need to do all
21 of that today. After the Court has read the papers and we
22 have a more formal argument, I'd like an opportunity to
23 address that more fully.

24 THE COURT: Surely.

25 MR. LEWIS: I think that we've sketched the

1 outlines of how we're going to proceed from here, so I don't
2 think I need to add anything more.

3 THE COURT: Okay.

4 MS. PERLIN: Your Honor, I would like the
5 opportunity for further argument at some point as well. I
6 don't agree with much of what Mr. Lewis said today.

7 THE COURT: I would assume you don't agree on very
8 much, both sides. This is really just a scheduling,
9 procedural conference. We'll get into substance later.

10 So do we all agree that it does not make sense to
11 have the conference until after the 28th of February?

12 MS. PERLIN: Yes.

13 MR. LEWIS: Yes.

14 THE COURT: Do you want to do it right after the
15 28th or wait a week or two just to let the dust settle? Does
16 it matter?

17 MS. PERLIN: A week might be good, just to give
18 everybody a chance to read it.

19 MR. McGOVERN: We're just discussing over here on
20 our side, your Honor, that Judge Gershon presumably will
21 receive a violation report prior to February 28th, and then I
22 would expect that she would order the parties to appear in
23 front of her within a couple of days after that. So maybe
24 two weeks after the 28th might be a good date.

25 THE COURT: Okay.

1 MR. McGOVERN: Obviously, that's going to be with
2 the caveat that our hearing may be unnecessary, given what
3 happens in front of Judge Gershon when she finds out that he
4 hasn't been paying any restitution as opposed to just paying
5 a --

6 MR. LEWIS: She was told that a long time ago.
7 She's not going to find that out. We told her that at the
8 last --

9 MR. McGOVERN: I understand.

10 MR. LEWIS: Right.

11 MR. McGOVERN: We just don't know what her
12 reaction is to that. She may be pleased by it, she may be
13 unhappy about it. We'll find out what happens when we
14 appear before her.

15 THE COURT: Well, two weeks is reasonably anyway,
16 two weeks after the 28th. I actually have a block of time on
17 the 15th of March, which is a Thursday.

18 MR. LEWIS: I have a court appearance in the
19 morning but I'm available -- that shouldn't spill over to
20 the afternoon. So after 2:00 is fine that day.

21 THE COURT: After 2:00? Okay, I have a 3:00, so
22 we could do it at 2:00 or 3:30, whichever you prefer.

23 MR. LEWIS: I'd say 3:30.

24 THE COURT: 3:30? Okay.

25 MR. LEWIS: Your Honor, I do have one request. I

1 don't know if your Honor could address it, but the document
2 that the Probation Department recently submitted to Judge
3 Gershon was submitted under seal, and I didn't even know
4 that it had been submitted. There was nothing on the docket
5 that indicated that it had been submitted. I learned of it
6 in communicating with Judge Gershon's courtroom deputy, and
7 I then had to make an application to unseal the document.
8 This is the document in which Probation requested additional
9 time to consider whether to bring a violation proceeding.

10 They made some statements about a travel request
11 that we had made that I would have liked to respond to in
12 time for it to make a difference. But because of the amount
13 of time that it took to make the application, have it
14 decided to unseal that document and then get a copy, we
15 weren't able to respond to a part of it in time for it to
16 make any difference.

17 So what I'd like to ask is if you could order the
18 Department of Probation to submit a copy to me for Mr.
19 Kestenbaum and anything that they submit under seal -- I
20 think that it's their routine practice to submit things
21 under seal. Most of the time, they're submitting probation
22 reports, which have to be submitted under seal. But I
23 shouldn't have to go through a process to get a copy of the
24 document that explains why they're proceeding as they are.

25 MR. MCGOVERN: I actually don't know the answer to

1 that question. I think if the question is or the request is
2 to copy the defense on everything that's filed between the
3 Probation Department and the Court, I actually don't know
4 what the rules are. I'm sure there's a good reason why
5 those matters are being handled in a confidential manner.

6 If we were asked to respond to this or move or
7 something like that, I guess we may investigate it, but I
8 don't know whether -- who has the authority to or if they
9 have the authority to order such a thing, that the Probation
10 Department start revealing all of its communications with
11 the Court that's supervising a given defendant.

12 MR. LEWIS: But a report as to whether they're
13 going to initiate a violation proceeding is something of
14 which we obviously have to be given notice. Due process
15 requires it. There's no conceivable reason why we would not
16 be entitled to see it, and it may be --

17 MR. McGOVERN: I think that sounds right. I mean,
18 that sounds right.

19 THE COURT: Yeah, that sounds right.

20 MR. McGOVERN: But the other thing about -- what
21 you originally bootstrapped, which was a communication
22 between the Probation Department and the Court about a
23 travel request, I believe it was, that I don't know if --
24 those sorts of communications, I don't know if they're
25 subject to review by the defense before they're made to the

1 Court.

2 That said, my experience tells me that if somebody
3 files a violation report against the defendant, typically,
4 the defendant is fully apprised of the contents of that
5 report. So I would think that that would be something that
6 an order of this Court would be unnecessary for you to
7 receive.

8 MR. LEWIS: And I make the request because the
9 last time they submitted a report, they didn't let me know
10 that they submitted it, there was nothing on the docket.
11 But for the happenstance of my talking to the courtroom
12 deputy, it does not appear that I would have been informed
13 of its filing.

14 THE COURT: Maybe you should start by just
15 contacting Probation, the probation officer who's assigned,
16 and say that you would like to either get copies of
17 correspondence that goes to the Court or be notified when
18 there is correspondence to the Court, so that you can move
19 to have it unsealed.

20 MR. LEWIS: I can try that. In the last instance,
21 when I learned of the submission under seal -- when I
22 learned of the submission, I contacted the Probation
23 Department, and they informed me it had been submitted under
24 seal. But I will certainly communicate that regarding to
25 the Probation Department, and I suppose if the answer is

1 unsatisfactory, I can renew the request.

2 THE COURT: I think if the communication comes to
3 me, I have no problem -- and there's no statute that says
4 that the submission has to be under seal, then I would not
5 have a problem with those -- unless the government has an
6 objection, we could talk about it. But I would have no
7 problem and I have no problem telling Probation that. I
8 can't speak for Judge Gershon, you know, whether
9 communications to her, she would want to have remain under
10 seal or not. You know, I would never speak for another
11 judge.

12 So to the extent there are communications to me
13 from the Probation Department, you can tell the Probation
14 Department that unless they believe there's as specific
15 reason why it needs to be sealed and why the defendant would
16 not have access to it, that there should be an exception to
17 the sealing, to allow at least the defendant to have access.
18 I think you can informally say that, and they will probably
19 want to communicate with me and find out if that's -- what I
20 want.

21 MR. LEWIS: Okay, I will convey that to them.

22 THE COURT: I don't know what else to say, really.

23 MR. LEWIS: I will do that.

24 THE COURT: Anything else?

25 MR. McGOVERN: No.

1 MS. PERLIN: No, your Honor.

2 THE COURT: Okay, so we are set for March 15th at
3 3:30. Okay, thank you.

4 MS. PERLIN: Thank you.

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I certify that the foregoing is a correct transcript
from the electronic sound recording of the proceedings in
the above-entitled matter.

A handwritten signature in black ink, appearing to read 'EB', with a long horizontal flourish extending to the right.

ELIZABETH BARRON

February 28, 2012